JD(ATL)–54–04
Columbus, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

DELILLE OXYGEN COMPANY

and **Cases 9–CA–40793**

TEAMSTERS LOCAL NO. 284, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Eric V. Oliver, Esq., for the General Counsel.
Dennis D. Grant, Esq., for the Respondent.
Jonathan C. Wentz, Esq., for the Charging Party.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Cincinnati, Ohio on June 21 and 22, 2004. Teamsters Local No. 284, affiliated with the International Brotherhood of Teamsters, AFL-CIO ("the Union") filed this charge on January 13, 2004. On April 15, 2004, an order consolidating cases, consolidated complaint and notice of hearing issued alleging, inter alia, that the Respondent, DeLille Oxygen Company, violated Section 8(a)(1) and (3) of the Act by discharging its employee Richard Moore on November 27, 2003.[1] The Respondent filed its answer to the complaint on April 23, 2004, denying the alleged unfair labor practice while admitting that it terminated Moore. The Respondent asserted that it lawfully terminated Moore because he engaged in unprotected, strike-related misconduct.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] Case No. 9-CA-40825, previously consolidated with the instant case, was severed at the hearing upon motion by the General Counsel, based on the Charging Party's request to withdraw the underlying unfair labor practice charge. The Charging Party had requested withdrawal of the charge based on a non-Board resolution of that case, involving the discharge of another striker for alleged misconduct.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, is engaged in the manufacture and processing of specialty, industrial and bulk gases, the sale of welding supplies and the repair of welding equipment at various facilities in the State of Ohio, including the facility in Columbus, Ohio that is involved in this proceeding. The Respondent annually purchases and receives at its Columbus facility goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Union has represented the Respondent's employees at the Columbus facility for approximately 30 years. The most recent collective-bargaining agreement expired on August 13, 2003.[2] The parties' negotiations for a new agreement were unsuccessful and, on November 12, the Union commenced a strike. The strike ended February 6, 2004 when the Union made an unconditional offer to return to work on behalf of the strikers.[3] The Respondent continued to operate during the strike by using supervisors, managers, non-striking employees and temporary employees to fill in for the striking workers. As of the close of the hearing, the parties had not yet reached agreement on a new collective-bargaining agreement.

There is no dispute that Moore, who had been employed by the Respondent since June 8, 1997, participated in the strike from its inception. His primary function during the strike was to remain at the site of the picket line during the night to safeguard Union property that was maintained at the site.[4] He did not ordinarily attend the picket line during the day. On November 21, however, Moore was at the picket line with his two children because TV personality Jerry Springer was scheduled to make an appearance in support of the strikers at 5:30 that afternoon. Because of this event, a larger number of people than usual were at the picket line that afternoon and there is some evidence that the crowd was perhaps more boisterous than on other days. Sometime after November 21, Moore received an undated letter from the Respondent informing him that he had been terminated, effective November 21, because of an incident of misconduct that allegedly occurred that day. In the letter, the Respondent's president, Thomas R. Smith, identified the alleged misconduct as follows:

> Specifically, you struck one of DeLille's trucks as it was attempting to exit the plant premises, with your fist or other object, and caused a dent in the driver side door. Simultaneously, you shouted obscenities at the driver and threatened to come to his home that night. You have made it widely known among the workforce that you are a professional boxer and this conduct on your part had a coercive and intimidating

---

[2] All dates are in 2003 unless otherwise indicated.

[3] The Union has alleged that the strike was an unfair labor practice strike. There is no dispute that the parties previously settled several unfair labor practice charges that had been filed by the Union over conduct alleged to have precipitated the strike. It is not necessary for me to determine whether the strike was a unfair labor practice or economic strike to resolve the issue of Moore's discharge.

[4] Moore is also a professional boxer, a fact known to the Respondent's supervisors and employees because they have attended his boxing matches in the area.

effect on DeLille's non-striking employees in violation of their Section 7 rights, and on its supervisors.

The sole issue in this case is whether the Respondent violated the Act by terminating Moore. The Board applies a two-part analysis to cases like this where the issue is whether an employer may lawfully refuse to reinstate or terminate a striker on the basis of alleged strike misconduct. As summarized by the Board in *Siemens Energy & Automation, Inc.,* 328 NLRB 1175 (1999):

> First, under the standard in *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), an employer may lawfully deny reinstatement to a striker whose strike misconduct under the circumstances may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Second, under the framework for analysis in *Rubin Bros.,* 99 NLRB 610 (1952), *General Telephone Co.,* 251 NLRB 737 (1984), and *Axelson, Inc.,* 285 NLRB 862 (1987), once the General Counsel has initially established that a striker was denied reinstatement for conduct related to the strike, the burden of going forward with the evidence shifts to the employer to establish that it had an honest belief that the striker in question engaged in the strike misconduct. If the employer establishes that, then the burden of going forward shifts back to the General Counsel to establish that the striker in question did not in fact engage in the alleged misconduct.

See also *Detroit Newspapers,* 342 NLRB No. 24 (June 30, 2004). This analytical framework is consistent with the Supreme Court's decision in *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 (1964), holding that an employer who terminates an employee in the mistaken belief that misconduct occurred in the course of protected activity violates the Act, even where the employer is acting in good faith on that mistaken belief. The Board, in *Siemens,* supra, explicitly stated that it is inappropriate to analyze these cases under the analytical framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As there is no dispute that Moore was terminated for conduct related to the strike, the Respondent had the burden of demonstrating that it had an honest belief that Moore engaged in misconduct sufficient to warrant termination. Smith, the Respondent's president who made the decision at issue, testified that he first became aware of an incident involving Moore through a radio communication he received from Josh Weinman, a recently promoted supervisor who was making a delivery to one of the Respondent's customers on November 21. Weinman told Smith that he observed a dent on the driver's side door of the truck when he arrived at the customer's location and that he believed the dent was caused when Moore punched the door as he was pulling out of the Respondent's driveway that afternoon. Weinman also reported that Moore had yelled, as he punched the door, "I know where you live." Smith testified further that, after receiving this report from Weinman, he went to the guard shack and spoke to the guards to determine whether they had seen anything or had recorded the incident on videotape. Smith then reviewed a videotape recording of the picket line from the time when Weinman's truck was exiting. After reviewing the tape, Smith waited for Weinman to return from his delivery and then he, Weinman and the Respondent's counsel looked at the truck to determine whether it was in fact dented. Smith admitted that it was dark by the time Weinman returned from his run. Nevertheless, Smith claims he verified the existence of a dent at the time. Smith admittedly did not take any photographs of the dent at that time and he admittedly did not question Weinman's

passenger, temporary security guard Nate Harper. In addition, Weinman was not asked to make a written statement to document the incident at that time.[5] Smith also conceded at the hearing that the videotape did not clearly show Moore striking the truck and did not record any verbal threat.

Smith testified that, after speaking to the guards, viewing the videotape, observing the dent and taking an oral statement from Weinman, he consulted the Respondent's counsel and made the decision to terminate Moore by applying the guidelines of *Clear Pine Mouldings,* supra. Smith testified that he also considered previous incidents involving Moore to determine whether Weinman's claim that Moore hit the truck and threatened him was credible. Smith cited only one such incident during his testimony. According to Smith, sometime in 2001, as Moore left a disciplinary meeting with the Respondent's Plant Manager, Scott Fisher, and Human Resources Manager, Rick Henderson, he passed Smith in the hallway. Smith testified that he heard Moore say, "I better get out of here before I give somebody a left hook." Smith brought this to the attention of Fisher and Henderson. Smith then confronted Moore in his work area, with Moore's steward present, and told him that he would not tolerate such language in his company. According to Smith, Moore apologized for his statement the next day. Although Smith referred to this incident as part of Moore's disciplinary history, he conceded that there was no record of any discipline based on the 2001 incident in Moore's personnel file. Smith claimed however, that the incident illustrated to him Moore's confrontational disposition, which led him to believe Weinman's statement. Smith also conceded that he did not mention this prior incident in Moore's termination letter. According to Smith, he did not believe it was necessary to cite in the termination letter every detail he considered in making his decision.

The Respondent placed in evidence the videotape of the November 21 incident. The tape is inconclusive. While it shows Weinman's truck exiting the facility and reveals at least two people approaching the driver's door as the truck is stopped, a huge spot of sun glare obliterates any image of what is transpiring at the crucial time. Moreover, even though Smith and Weinman claimed to be able to identify Moore as one of the individuals approaching the truck, it is impossible for an outsider to make such an identification from the tape. Weinman essentially made his identification based on his having been there and having seen who approached the truck. Smith claimed to have been able to identify Moore based on the physique of the person seen on the video. All parties identified the other individual seen on the tape approaching the truck as Ira Cross, a witness for the General Counsel who confirmed his presence there that day.[6]

The Respondent also offered into evidence several photographs purporting to document the dented door. The Respondent's Vice President James Smith, no relation to Thomas Smith, took these photographs with a digital camera. The photographs were admittedly taken several days, if not a week, after the dent was allegedly inflicted on the vehicle. While the photos appear to show an indentation, it can not be determined from these photos when or where the dent occurred. There is no dispute that the Respondent did not have the dent repaired until April 6, 2004. The invoice for the repair work shows that it cost the Respondent $336.26. The Respondent's delay in fixing the dent contrasts with its normal practice of repairing damage to vehicles soon after it is incurred.

[5] According to Weinman, he provided a written statement to one of the Respondent's attorneys in December as part of the Respondent's efforts to get a temporary restraining order against the Union.

[6] The audio portion of the video does not capture any threat being made by Moore or anyone else. For the most part, the audio portion is indecipherable.

Weinman testified as a witness for the Respondent. He had been employed in the bargaining unit, working with Moore, until shortly before the strike when he was promoted to supervisor. Moore and Weinman had started with the Respondent at about the same time and apparently were on good terms before the strike. Moore in fact helped Weinman move into his new home. According to Weinman, he was stopped at the gate waiting for the security guard to motion him to pull out onto the street when he saw Ira Cross, a striker, walk up to the door of his truck. Cross pulled on the door with his right hand while smacking the window with his open left hand, yelling, "open the f---ing door." Weinman testified that he then saw Moore walk over to the truck from the telephone pole where he had been standing with his girlfriend and children. Weinman testified further that he saw Moore look up at him, cock back and punch the door of the truck while yelling, ""you punk ass m*f*r, I know where you live." According to Weinman, he stopped looking at Moore at that point, turning his gaze to the guard who was motioning him out of the driveway. Weinman testified that, as he was pulling out, he saw the Union's business agent, Paul Suffoleto, walking around the front of the truck, yelling, "Josh, we're on to you."[7] While acknowledging that others were in the area of the picket line at the time, Weinman insisted that the only two people standing at the door of his truck while he waited to exit were Moore and Ira Cross.

Weinman testified that when he got to his delivery, he observed the dent on the door for the first time. According to Weinman, he had done a required safety inspection before getting into the truck and had not noticed any dents. However, the safety check did not specifically require him to look for dents. Although Weinman claimed that the truck he was driving was a relatively new one, in good physical condition, he acknowledged that it is not uncommon for there to be dings on the Respondent's trucks. Weinman testified that, after observing the dent, he radioed Smith and told him what had happened and that, when he returned to the plant that evening, he went to the office and got Smith and the Respondent's counsel so they could inspect the truck themselves.

The General Counsel called Moore as a witness to testify regarding the November 21 incident. Moore admitted approaching Weinman's truck while it was stopped, waiting to exit the Respondent's facility. He denied punching the door of the truck or threatening Weinman. According to Moore, the only thing he did was "holler at Weinman, calling him a backstabber." Moore conceded he may also have reached up and tapped on the window of the truck to get Weinman's attention. Moore testified that Weinman did not respond, or even look at him. Moore also recalled that there were about 6-10 people in the vicinity of the truck, most of whom were not striking employees of the Respondent. According to Moore, Ira Cross and Ira Freeman were the only employees at the door of the truck.

The General Counsel also called Ira Cross to corroborate Moore's testimony. Ira Cross had also been terminated by the Respondent for alleged strike misconduct after 38 years of employment. The parties stipulated that the Board's Regional Director dismissed an unfair labor practice charge filed by the Union over his termination. Cross recalled being at the picket line on November 21 and seeing Weinman's truck leaving the plant. Cross testified that he was standing about 4 feet from Moore on the driver's side of the truck, and that he did not see Moore hit the truck or hear any threats. However, Cross claimed there were a lot of people standing around saying things, and that the strikers "always say something" when a truck crosses the

[7] Harper, Weinman's passenger on November 21 did not testify in this proceeding. Although Smith claimed that Harper was "unavailable", it is unclear what efforts the Respondent made to secure his attendance at the hearing.

line, but he could not recall what was being said at that time.

The record reveals that, in addition to Moore and Ira Cross, the Respondent terminated three other strikers, Tom Cross, Chet Boring and Jason Moore, for alleged misconduct. Ira Cross was terminated for striking a vendor's vehicle with a stick. The parties settled the unfair labor practice charge involving Tom Cross' termination before the hearing. Boring was terminated for throwing a rock that almost hit a passenger in one of the Respondent's trucks. The Respondent ultimately rescinded Jason Moore's termination, after further investigation cast doubt on a witness' identification of him as the person who allegedly threw a rock at her car. The Respondent also rescinded a ten-day suspension it had imposed on another striker, Ira Freeman, for trespassing and threatening Smith and others. Smith testified that he decided to rescind the suspension rather than incur the cost of fighting it through litigation. Despite the settlement of the allegations involving Thomas Cross' termination, the General Counsel offered evidence regarding the incident for which he was terminated in order to show that the Respondent discriminated in its treatment of misconduct by strikers and non-strikers.

Tom Cross was terminated for an incident that occurred on January 14, 2004 at a fuel depot not far from the Respondent's facility. The incident began at the picket line when a truck driven by non-striking employee Dana Corzatt allegedly struck Tom Cross as it was exiting the plant.[8] There is no dispute that Tom Cross got into his vehicle and followed Corzatt's truck to the fuel depot where he confronted Corzatt. Witness statements provided to the Respondent at the time indicate that Cross jumped on the running board of Corzatt's truck and reached in the open window, grabbing Corzatt. At that point, according to these statements, L.A. Ricks, a temporary employee who was driving another of the Respondent's trucks that day, struck Tom Cross with a tire iron which caused Cross to release his grasp of Corzatt and fall or jump down from the truck. The statements reveal that, at that point, another striking employee, Tom Clapper, confronted Ricks while holding a baseball bat. Ricks responded by saying, "you want a piece of me?" and grabbed the bat. Clapper and Ricks were separated by one of the Respondent's salesman, Gary Rizor, who was riding as a passenger in Corzatt's truck. As a result of this incident, Smith terminated Tom Cross, suspended Ricks for one week and sent a letter to Clapper accusing him of "very poor judgment" for brandishing the baseball bat while other employees were involved in a confrontation.

Counsel for the General Counsel questioned Smith at length regarding the bases for his decision to issue different forms of discipline to the individuals involved in the January 14, 2004 incident. In addition to the contemporaneous witness statements, each side felt constrained to call witnesses to testify about the event itself. The General Counsel called Clapper, but not Tom Cross or Bill Jones, another striking employee who was in Clapper's car at the time. The Respondent called Corzatt and Steve Rose, another of its salesman who had been a passenger in Ricks' truck that day, but not Ricks or Rizor. As to be expected, these witnesses' recollections of the event differ based on the particular perspective they had and the side of the dispute they were on. I find it unnecessary to resolve any dispute regarding what actually happened on January 14. In assessing whether the Respondent's treatment of the participants in the January 14 fracas displays disparate treatment when compared to its termination of Moore for the November 21 incident, I need only consider the information that was available to the Respondent at the time it made its decisions in the two situations.

Smith testified that he fired Tom Cross because he engaged in an unprovoked attack on Corzatt. According to Smith, he reached this conclusion after considering the statements of the

[8] There is some dispute whether the truck actually hit Cross or whether he was faking it.

witnesses and after reviewing videotape to determine whether Corzatt had hit Cross with his truck. The video, which is in evidence, does not clearly show any physical contact between the truck and Cross. Smith also testified that he considered the fact that Corzatt had recently returned to work following heart surgery. Smith explained that he didn't fire Ricks, even though all the witnesses agreed that Ricks struck Cross with the tire iron, because he considered Ricks' actions defensive in nature. According to Smith, Ricks acted in defense of Corzatt. Finally, Smith did not discipline Clapper, even though he was wielding a baseball bat, because he did not hit anyone with the bat. Smith admitted that he did not seek out witnesses such as Clapper, Cross and Jones, who were on strike at the time. As with his decision regarding Moore, it was based essentially on a one-sided view of the facts.

The Respondent's burden of establishing its "honest belief" that Moore engaged in the misconduct alleged does not require that the Respondent prove that the misconduct in fact occurred. *Axelson, Inc.,* supra. The Respondent may rely on hearsay sources, such as reports from non-striking employees, security guards, police reports, etc. *Clougherty Packing Co.,* 292 NLRB 1139, 1142 (1989); *Newport News Shipbuilding,* 265 NLRB 716, 718 (1982); *General Telephone Co. of Michigan,* 251 NLRB 737, 739 (1980). The Board has held that he assessment of the Respondent's belief must be based on the evidence available to it when it took the action it did and that it is not necessary for the Respondent to obtain the striker's version of events before making a decision. *Detroit Newspapers,* 340 NLRB No. 121, slip op. at JD 6-7 (November 21, 2003) and cases cited therein.

At the time the Respondent made the decision to terminate Moore, it had available to it Weinman's oral report of what happened, a visual inspection revealing a dented driver's side door on the truck, and an inconclusive video of the event. The guards at the picket line apparently saw nothing since Smith did not cite any reports from them. It is unknown whether Harper, who was in the truck with Weinman, saw anything because Smith did not ask him about it. Thus, the Respondent relied on an uncorroborated report from a newly promoted supervisor to determine that Moore had damaged its vehicle and threatened the supervisor. While this may seem a somewhat flimsy basis to make such a decision, the Board does not require an extensive investigation. See *Detroit Newspapers,* 340 NLRB supra, and cases cited therein. Unless there was some reason for Smith to question the veracity of Weinman, it would not be unreasonable to rely upon a first-hand witness account. In addition, Smith also relied upon what he knew about Moore, i.e. that he was a professional boxer and that he had displayed a violent temper in the workplace. Under these circumstances, Smith's acceptance of Weinman's report that the dent was caused by Moore having punched the truck and that Moore verbally threatened Weinman was not unreasonable.

The General Counsel's argument in his brief appears to question the "honesty" of the Respondent's belief that Moore engaged in the conduct alleged. The General Counsel claims for example that Tom Smith was not a credible witness. Although I noted that Smith was argumentative and at times non-responsive on cross-examination, his testimony regarding the bases for his decision in Moore's case and his rationale for the discipline of others was consistent and straightforward. The General Counsel also claimed that Smith's failure to mention Moore's prior instance of violent behavior in the termination letter is suspect and indicates that his reference to this incident at the hearing was a form of bootstrapping. Smith conceded that the purpose of the termination letter was to inform Moore of the reasons for his termination. He explained, however, that the 2001 incident was not a reason for the termination but a factor he relied upon in ascertaining whether Moore was capable of the conduct attributed to him by Weinman. I find this explanation for the omission reasonable.

The General Counsel also contrast the somewhat speedy decision to terminate Moore with the more deliberative process that the Respondent followed before issuing discipline to the individuals involved in the January 14 incident. I note that Moore was discharged soon after the strike commenced and it is not extraordinary for the Respondent to have acted promptly to convey to the striking employees that misconduct would not be tolerated. By the time of the January 14 incident, the employees had been on strike for two months and it is not surprising that the Respondent's investigatory process would have evolved. I also note that there were more witnesses to the January 14 incident, as well as an allegation that non-strikers engaged in misconduct. The Respondent's decision to proceed more cautiously would not be suspect under the circumstances. Accordingly, having considered the evidence and the arguments of the parties, I find that the Respondent has met its burden of proving that it had an honest belief that Moore engaged in misconduct when it terminated him.

The Board has held that not all misconduct on the picket line is sufficient to disqualify a striker from reinstatement. *Detroit Newspapers,* 342 NLRB supra; *Medite of New Mexico,* 314 NLRB 1145, 1146 (1994). In *Clear Pine Mouldings,* supra, the Board adopted an objective test for assessing the seriousness of strike misconduct. The Board held that strike misconduct is sufficient to warrant disqualification from reinstatement if, under all the circumstances, it may reasonably tend to coerce or intimidate other employees in the exercise of rights protected under the Act. Because this is an objective test, it is irrelevant whether any particular employee was actually coerced or intimidated. The Board has applied the *Clear Pine Mouldings* test to misconduct directed at nonemployees such as supervisors, security guards, and independent contractors. *General Chemical Corp.,* 290 NLRB 76, 82 (1988); *PBA, Inc.,* 270 NLRB 998 (1984). The alleged misconduct attributed to Moore, i.e. punching and denting the truck's door while yelling to the driver, "I know where you live", is sufficiently serious on an objective basis to warrant a loss of reinstatement rights. The statement is an implied threat that Moore would seek out Weinman at his home. The physical aspect of striking the truck with his fist hard enough to cause a dent would reinforce the threatening nature of Moore's comment. The fact that Moore was generally known among the Respondent's employees and supervisors as a professional boxer added more weight to the threat implied in his words and actions on November 21. Thus, the conduct attributed to Moore by Weinman would be sufficient under the *Clear Pine Mouldings* standard to deny reinstatement under the Act.

The Respondent having met its burden, the burden shifted to the General Counsel to prove that Moore did not engage in the alleged misconduct. Resolution of this issue turns almost exclusively on credibility. As previously noted, the videotape does not clearly show what, if anything, Moore was doing, or even that he was one of the individuals seen near Weinman's truck. The photographs showing the dent on the door of Weinman's truck do not aid in resolving this issue. The photographs were taken up to a week later. Because the truck had been in use during that time, it is impossible to say with certainty that the dent that was there when the photos were taken was there when the truck left the plant on November 21. Thus, the General Counsel's case comes down to whether Moore or Weinman is more believable with respect to the incident.

The General Counsel attempted to bolster Moore's denial of the alleged misconduct by calling Ira Cross as a witness. While there is no dispute that Ira Cross was there, and all parties agree that he is seen approaching the truck on the videotape, Cross did not clearly refute the allegation of misconduct. His testimony that he did not see Moore hit the truck is undermined by his admission that he did not have a clear recollection of what transpired because there were so many people around. He also acknowledged that he really could not recall what anyone, including Moore, said as Weinman attempted to exit the plant because of the level of noise at

the time. Ira Cross' testimony thus does not convince me that Moore did not engage in the conduct alleged.

The General Counsel argues that Weinman's testimony should not be credited. However, he provides very little reason for questioning the veracity of this witness. For example, the General Counsel claims that Weinman's testimony that only two people, Ira Cross and Moore were at the door of the truck when the incident occurred is contradicted by the testimony of Moore and Ira Cross that at least 6-10 people were around the truck. The videotape, despite its drawbacks, does not show 6-10 people near the truck. Moreover, Weinman acknowledged that, after Moore punched the truck, others approached as Moore and Cross were walking away and he was pulling out. This testimony is not inconsistent with his testimony that only Ira Cross and Moore were at the door when it was punched. The General Counsel also questioned Weinman's inability to identify any of the other picketers who were approaching the truck after Moore and Ira Cross walked away. Weinman's inability to identify these individuals is consistent with Moore's testimony. Moore also could not identify any one other that Ira Cross and Ira Freeman because the others were union supporters who were not employed by the Respondent.

The General Counsel also argues that an adverse inference should be drawn from the Respondent's failure to call Harper as a witness. This is a more persuasive argument but not conclusive. As the passenger in Weinman's truck at the time of the incident in question, Harper is a witness likely to have knowledge of the event. The failure of the Respondent to question him, or produce him at the hearing, would support an adverse inference if it could reasonably be assumed that Harper would be a witness favorably disposed to the Respondent.[9] See *Grimmway Farms,* 314 NLRB 73, fn. 2 (1994). Harper was a security guard hired to work during the strike through an independent contractor. He left employment at the Respondent's facility in December, shortly after this incident. Assuming arguendo that Harper "would be a witness favorably disposed" to the Respondent, his absence at most leaves Weinman's testimony without corroboration. Although I may infer that Harper would not have supported Weinman's testimony that Moore punched the truck and threatened him, I cannot leap to the conclusion that Harper would have testified that Moore did not do these things. It may very well be that, as with Ira Cross, Harper may not have seen what happened because of his location and the other activity going on around him. Moreover, in considering whether adverse inferences are warranted, I note that the General Counsel failed to call any of the other individuals who Moore claimed were also standing at the door of Weinman's truck, including Moore's fellow striker, Ira Freeman. Because these individuals were picketing in support of the Union, it could reasonably be assumed they would have supported the Union and the General Counsel. Thus, any adverse inferences drawn would wash out and still leave me with having to resolve the conflict between the testimony of Moore and Weinman.

Having considered all the evidence in the record regarding the incident, as well as the parties' arguments, I find that the General Counsel has not met his burden of proving that Moore did not engage in the misconduct alleged in his termination letter. See, e.g., *National Telephone Directory Corp.,* 319 NLRB 420, 422 (1998) and cases cited therein; Accord: *Sea Crest Construction Corp.,* 330 NLRB 584 fn. 1 (2000) (where nothing in the demeanor of the witnesses or in the record evidence indicates why one of two competing witnesses should be

[9] I find Smith's testimony that Harper was "unavailable" to testify insufficient to justify his absence. The Respondent apparently made no effort to secure his appearance at the hearing through legal process and offered no explanation for his unavailability other than Harper's hearsay declaration.

credited over the other, an administrative law judge may find on a preponderance of evidence standard that the party whose burden it is to prove the particular matter has not sustained his burden).

The General Counsel alleges that even if Moore engaged in the misconduct alleged by the Respondent, his termination was unlawful because the Respondent did not treat strikers and non-strikers evenhandedly. In *Chesapeake Plywood,* 294 NLRB 201, 204 (1989), the Board relied upon such disparate treatment in reversing an administrative law judge's dismissal of an unfair labor practice charge with respect the discharge of one striker. See also *Gibson Greetings,* 310 NLRB 1286, 1291-1292 (1993), enfd. in pertinent part, 53 F.3d 385 (D.C. Cir. 1995); *Aztec Bus Lines,* 289 NLRB 1021, 1027-1029 (1988). However, the Board upheld the judge's dismissal of charges as to several other strikers, finding that the employer had provided "a legitimate factual basis" for drawing a distinction between the threats made by strikers and the threat made by a non-striker. The Board noted that the employer had concluded that the non-striker's threat was provoked and conditional in nature and could have been viewed as an attempt at self-defense. In considering the one instance of alleged disparate treatment here, I find that a similar finding is warranted.

To prove disparate treatment, the General Counsel relies on the Respondent's treatment of the individuals involved in the January 14 incident at the fuel depot. Under Board precedent, the Respondent's treatment of strikers Tom Cross and Sam Clapper for their involvement in the incident cannot be considered disparate treatment because they were engaged in the same protected activity as Moore. *Chesapeake Plywood,* 294 NLRB Supra, at 203, fn. 9.[10] That leaves only the Respondent's one-week suspension of temporary replacement Ricks for comparison. There is no dispute that Ricks was reported to have struck striker Tom Cross with what amounts to a tire iron. Ricks' blow may even have caused Cross to fall off the running board of Corzatt's truck. However, all of the evidence available to the Respondent when it made its disciplinary decision in the January 14 incident indicated that Tom Cross had his hands on Corzatt at the time. Thus, the Respondent had a legitimate factual basis for distinguishing Ricks' conduct, which was defensive in nature, from Moore's alleged unprovoked attack on Weinman's truck and his threat to Weinman. In the absence of evidence that the Respondent tolerated misconduct on the part of non-strikers that was as serious as that attributed to Moore, I cannot find that the Respondent subjected Moore to disparate treatment.

Accordingly, based on the above, I find that the General Counsel has not established that the Respondent's discharge of Moore for alleged strike misconduct on November 14 violated the Act. Accordingly, I shall recommend dismissal of the complaint in this case.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) and (3) of the Act by terminating Richard Moore effective November 14, 2003.

[10] The same rule would apply to the Respondent's decision to rescind discipline issued to other strikers when further investigation raised doubts as to the alleged misconduct.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.